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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/007,002
Filing Date: November 30, 2001
Appellant(s): NEAL ET AL.

Kang Lim

For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7/7/08 appealing from the Office action mailed 11/19/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,873,069	Reuhl et al.	2-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claims 1-4,9,25,26,29, are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

For claim 1, the limitation that the rule prioritizer is configured to "*prioritize*" a plurality of relaxable rules is considered to be new matter. The specification as originally filed disclosed that the user, not the system itself, decides the priority of the rules. The system is either set to a default priority mode for the rules (which was

decided beforehand by a human who set up and programmed the system) or the user can select priorities for the rules that are other than the default settings, see the specification as was originally filed on page 21, lines 13-16. The rule prioritizer was not disclosed as actually prioritizing the rules, which is what is claimed.

3. Claims 2,15, are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

For claims 2,15, applicant has amended the claim to recite "*and further wherein the largest impact on the optimization is determined by ranking all products by a marginal contribution to the optimization and selecting no more than N products by a mixed integer problem*". As this is best understood by the examiner the specification on page 33 is discussing this mixed integer problem. What are all of the variables that are used in this equation and how are they determined? This is not clear and does not seem to be discussed to an extent that would allow one skilled in the art to practice what is claimed. While applicant has some discussion as to how this mixed integer problem is solved, the discussion does not seem to be sufficient to the point where this aspect of the claim is enabled. The examiner has concluded that one of skill in the art would have to undergo undue experimentation to practice the claimed invention. How is this aspect of the claim performed? This is not clear. Is the discussion on page 33 the

mixed integer problem that is referred to in the claims? If so, further clarification or explanation is required to explain how this is enabled.

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 2,15, are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

For claims 2,15, the language at the end of the claim that reads "*and wherein the selected no more than N products has the largest impact on the optimization of prices of any subset of no more than N products of the plurality of product, and further wherein the largest impact on the optimization is determined by ranking all products by a marginal contribution to the optimization and selecting no more than N products by a mixed integer problem*" is indefinite. The claim recites that the product designator "enables" a number N to designated, and the product designator selects no more than N products. What are the products that will have the largest impact on the optimization of prices of any subset of no more than N products of the plurality of products? One wishing to avoid infringement would have no idea what products are defined by this language and which products are not defined by this language. This renders the claim indefinite. Also, if one were doing an optimization for prices, how would you know what products will have the largest impact on the optimization of prices? This is like knowing the answer before the program is allowed to run. This does not seem to make any

sense. The newly added language of *"and further wherein the largest impact on the optimization is determined by ranking all products by a marginal contribution to the optimization and selecting no more than N products by a mixed integer problem"* is also indefinite. This added language is directed to the manner by which the selected N products are chosen. What structure does this define to the claimed system? The examiner has no idea what this language is attempting to define.

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-4,9,14-19,25-30, are rejected under 35 U.S.C. 102(b) as being anticipated by Reuhl et al. (5873069).

For claims 1,14, Reuhl discloses a method and system (with software) where product sales and price data is entered into a computer system and the system then "optimizes" (optimization engine) the prices of numerous products based on the inputted sales data. The system is configured to find the best price for products, which is done to achieve a business goal. The system is optimizing in the sense that they are making the system determine the best price, which to Reuhl, is the lowest price. The software has a rule prioritizer with criteria (rules) for figuring out the final pricing of the products.

The rules include looking for sales prices, advertised prices, etc., as well as applying a cent code to the resulting lowest price, and then the rules check to ensure that the new active price with the cent code is not greater than the competitor price. If the new price with the cent code results in the price being higher than the competitor price, then a new active price is calculated by incrementally relaxing the cent code rule (done by a rule relaxation module portion of the software). This is an iterative process. If the calculated price for a given item(s) is $4.53, and the cent code rule requires the item to end in a 9, the price is changed to 4.59 in accordance with the cent code rules. Then the system compares the price of $4.59 to the competitor's price to ensure that a higher priority rule (lowest price) is feasible. If $4.59 is not the lowest price, 10 cents is subtracted to arrive at a new price, which is $4.49 (relaxing the cent code rule that stated the price should end in 9, namely from $4.53 to $4.59). The incrementally relaxing (rule relaxation module) of the rule results in the price changing from $4.59 to $4.49. This is done in increments of 10 cents at a time. The rules are prioritized as claimed because the rules for figuring out prices look to various conditions and moves on to other conditions if prior conditions are not feasible (result in the price being higher that the competitor). The storage medium of claim 1 is disclosed in column 3, lines 29-32. The steps of storing initial prices are satisfied because at some point you must input some kind of price into the system. This is inherent. Also, when new data is sent to the system, the price setting process is repeated, which also defines an "iterative" process. Reuhl discloses a product designator configured to designate a subset of products. This is because the computer system (software) only optimizes prices for products that have had new sales

data entered into the system, which is in the scope of what is claimed. Applicant also disclosed this as an example on page 28, "*One possible assumption for an algorithm may be that the maximum number is at least as large as the number of products with information changes*". So in Reuhl, if sales data for televisions is updated in the system, the prices for batteries will not be changed. This satisfies what is claimed. The examiner encourages applicant to read the entire patent to Reuhl, but also refers applicant to the following sections of particular relevance to the claimed invention. See column 6, lines 29-44; col. 7, lines 23-39; col. 8, lines 12-27; col. 10, lines 28-32; col. 11, and lines 26 to column 12, line 52. With respect to the newly added limitation of a "rule editor", the examiner considers this to be inherent to Reuhl. Applicant has claimed a rule editor that allows the rules to be set by a user. In Reuhl a person had to program the system and write the computer program that runs the optimization. All computer programs are capable of being edited and changed if one desired to do so. In Reuhl there is an inherent ability to set the rules any way a user wants, you just need to change the programming. If one wanted to, they could change the programming to specify that prices ending in a 7 as opposed to a 9 are to be run again for a new price. Nothing is stopping a user from changing the actual program itself to set new rules. This ability is inherent to Reuhl and the examiner believes that this reads on what is claimed. With respect to the language reciting rule parameters and the fact that the plurality of rules are set using these parameters, this appears to be more of a method step which defines no further structure to the system claimed in claim 1. Inherently the rules are set using some sort of parameters. The person who decides on the rules has

some parameters in mind when they decide on the rules themselves. With respect to claiming that the rule editor uses default values, this is found in Reuhl. The default values are those that are programmed into the system.

For claims 2,15, the "N" products are the number of products that the new sales data relates to. N can be the number of televisions that prices are being optimized for. As best understood by the examiner, this satisfies what is claimed. In the opinion of the examiner all that is claimed is the ability to designate a number N, or allowing a number to be designated (which is not even actually designating the number, just allowing it to occur). The manner by which the number N is determined is not given much weight because this can be done by the person and not the system. The product designator allows a number N to be designated and then that number of products is selected. The manner by which that number is determined is not seen as being related to the system as claimed as this can be done by a person.

For claim 3,16,25-28, Reuhl results in prices for items that are optimized for profit, total revenue, and sales volume. The intent of the price determination system and method of setting prices is to make money by selling your products. By ensuring that your prices are lower than competitor's prices, you are optimizing the prices for profit, total revenue, and sales volume at the same time. If you have the lowest prices in a particular area for a given item, you will sell more of that item than you would otherwise sell if the price were higher, and this results in a greater sales volume, a greater total revenue (if you sell more of the items, you bring in more money), and a greater profit due to the greater sales volume.

For claims 4,9,17, with respect to “initial prices”, once you run an optimization routine, the very last price prior to the optimization is the “initial price”. Reuhl discloses what is claimed.

For claims 18,19, the claimed “new data” is the newly received pricing data that is used to arrive at new prices and the new price bound data is the identification of the product that the newly received pricing data is for. When a competitor changes the price of an item, data is received that identifies the product and the new price. The optimization methodology is then followed to figure out a new price. This satisfies what is claimed.

For claims 29,30, because of the ability to change the programming one is capable of configuring a unit pricing rule. This would be the change in price for a given product. A product is a unit (i.e. singular).

(10) Response to Argument

With respect to the 112 rejections and the comment that "*Appellants believe a pragmatic and reasonable amending of the claims would be acceptable should the Appeal Board believe it would aid in alleviate concerns under 35 USC 112*”, the examiner is not clear what to make of this comment. This statement seems to imply that appellant feels that an amendment to the claims would render the 112 rejections moot, which also seem to imply that the 112 rejections have merit.

Concerning the 112,1st rejection and the issue of new matter, appellant has argued that the limitation of "a rule prioritizer configured to prioritize the plurality of relaxable rules" is not new matter. The examiner still disagrees. With respect to page 21 of the specification it is stated that rules are prioritized and that a user is provided with an interface so that **the user** may change the prioritization from the default (where the default is also decided upon by a person). It is a person and not the system that actually prioritizes the rules. A human person decides on what priority the rules are going to be in, and the human enters this into the interface so that the system can go through the rules in the order desired by the user. This is not the same as the system itself deciding on what the priority is, which is what appears to be claimed. There is a difference. With respect to original claim 8, which was relied upon for support in the specification as originally filed for this limitation, this claim recited computer code "for allowing" prioritization of a plurality of rules, but it is still a human that is the one actually prioritizing the rules, not the system. The computer system of the disclosure is programmed by a person to have rules in a certain priority. The computer does not decide on the order for the rules on its own because this must be done by a human. The examiner agrees that the rules are stored in the system after a user decides on what the order is to be, but the actual priority of the stored rules is decided upon by a person and not the system itself. The examiner does not believe that the application as originally filed provides support the limitation that there is "a rule prioritizer configured to prioritize the plurality of relaxable rules". The argument is not persuasive.

With respect to the 112,1st enablement rejection and claims 2 and 15, the argument is not persuasive. The claims recite "*and further wherein the largest impact on the optimization is determined by ranking all products by a marginal contribution to the optimization and selecting no more than N products by a mixed integer problem*". As this limitation is best understood by the examiner, the specification on page 33 is discussing this mixed integer problem that is referred to in the claims. The explanation by appellant is not persuasive. It is still not clear as to what the variables in the equation are and how they are determined. The examiner notes the equation that applicant has referred to from page 33 of the specification as originally filed, but page 33 does not explain what all of the variables are or how they are determined. Appellants traverse seems to be just a citation of the specification with no meaningful explanation as to how this equation is solved and what the variables are. Appellant has referred the examiner to page 30 for two of the variables in the equation where they are apparently defined as "the marginal values on the upper and lower bounds defined in the final inequality constraints". What does this mean? This is not an explanation that is sufficient to the point where one of skill in the art would understand what this means. The equation does not appear to be set forth with sufficient guidance to allow one of skill in the art to practice the invention as claimed without undue experimentation. The argument is not persuasive.

With respect to the comment that the Appeal Board is urged to review various sections of the specification in relation to the 112,1st rejection, this is not taken as an argument because it is not clear what applicant is arguing.

With respect to the 112,2nd rejection, the language at the end of claims 2,15 that reads "*and wherein the selected no more than N products has the largest impact on the optimization of prices of any subset of no more than N products of the plurality of product, and further wherein the largest impact on the optimization is determined by ranking all products by a marginal contribution to the optimization and selecting no more than N products by a mixed integer problem*" is still considered to be indefinite. The entire argument is nothing more than a referral to the specification and an allegation that the claims are not indefinite. Appellant has essentially cited the portion of the specification where this is discussed and has argued that the products are chosen "in a way that has the largest impact on the client's objective function". This is not persuasive as it is just repeating the language at issue with no real further explanation. The issues the examiner still has with this language is: what are the products that will have the largest impact on the optimization of prices of any subset of no more than N products of the plurality of products? One wishing to avoid infringement would have no idea what products are defined by this language and which products are not defined by this language. If one were doing an optimization for prices, how would you know what products will have the largest impact on the optimization of prices? This is like knowing the answer before the program is allowed to run. This does not seem to make any sense and the response from appellant does not address this issue in the opinion of the examiner. The language of *"and further wherein the largest impact on the optimization is determined by ranking all products by a marginal contribution to the optimization and selecting no more than N products by a mixed integer problem"* is also indefinite. This

added language is directed to the manner by which the selected N products are chosen. What structure does this define to the claimed system for claim 2? Applicant is reminded that claim 2 is an apparatus type of claim and is not a method claim. What structure does this language define? The examiner does not see where appellant has addressed this aspect of the 112,2nd rejection in the arguments.

With respect to the comment that the Appeal Board is urged to review various sections of the specification in relation to the 112,2nd rejection, this is not taken as an argument because it is not clear what applicant is arguing.

With respect to the 102 rejection, the arguments are not persuasive.

Appellant has argued that Reuhl does not disclose a price optimization. The examiner disagrees because in Reuhl prices are determined, and they are optimized to be lower than a competitor. The prices are optimized to be the lowest price. Applicant is claiming a process of setting prices that is disclosed by Reuhl, as far as the claim language goes and the body of the claim. By having the lowest prices for various products, the owner of the system of Reuhl is configuring the system to arrive at a price that is effective as possible, which to them is the lowest price (i.e. optimized). It is very well known in economics that lower prices attract consumers and consumers don't want to have to pay more for a product than they have to. By having the lowest prices, this allows for increased sales volume and increased profits due to the increased sales volume for that given item. Also the increased sales volume and profit can be due to the fact that you get customers into the store by luring them in with the low priced goods. Reuhl does teach a method of price optimization in the opinion of the examiner.

The argument that the present invention is multi-faceted, and capable of providing an array of configurable optimization objectives is noted as not being commensurate with the scope of the claims because this is not recited in either of claims 1 and 14. This is an argument directed to the disclosed invention as opposed to the claimed invention.

Appellant has argued that Reuhl fails to disclose a rule prioritization as claimed. Appellant has argued that Reuhl only has two criteria, one being that last digit ending in a nine, and a 2nd being a lower price than a competitor. Appellant has argued that these rules are static. Then appellant concludes that Reuhl does not disclose what is claimed. The examiner disagrees. The software in Reuhl has a rule prioritizer with criteria (rules) for figuring out the final pricing of the products. The rules include looking for sales prices, advertised prices, etc., as well as applying a cent code to the resulting lowest price, and then the rules check to ensure that the new active price with the cent code is not greater than the competitor price. If the new price with the cent code results in the price being higher than the competitor price, then a new active price is calculated by incrementally relaxing the cent code rule (done by a rule relaxation module portion of the software). This is an iterative process. If the calculated price for a given item(s) is $4.53, and the cent code rule requires the item to end in a 9, the price is changed to 4.59 in accordance with the cent code rules. Then the system compares the price of $4.59 to the competitor's price to ensure that a higher priority rule (lowest price) is feasible. If $4.59 is not the lowest price, 10 cents is subtracted to arrive at a new price, which is $4.49 (relaxing the cent code rule that stated the price should end in 9, namely from $4.53 to $4.59). The incrementally relaxing (rule relaxation module) of the rule

results in the price changing from $4.59 to $4.49. This is done in increments of 10 cents at a time. The rules are prioritized as claimed because the rules for figuring out prices look to various conditions and moves on to other conditions if prior conditions are not feasible (result in the price being higher that the competitor).

Appellant has argued that Reuhl fails to disclose setting a plurality of rules, even if one were to conclude that Reuhl discloses a plurality of rules. In response, if one has a plurality of rules that are going to be looked at, them must be in some order because you cannot consider each one at the same time;' therefore they have been set. The language at issue is:

"*a rule editor configured to set a plurality of relaxable rules, wherein the plurality of relaxable rules is set utilizing rule parameters, wherein the rule editor utilizes default values of the rule parameters, and further wherein the rule editor enables configuring of the rule parameters by a user*" (claim 1), and

"*setting, using the computer system, a plurality of relaxable rules, wherein the setting of rules utilizes rule parameters, and wherein the rule parameters include default rule parameters and configured rule parameters*" (claim 14).

Appellant has argued that this is not present in Reuhl and if the position of the examiner is accepted, then a software program can be used to reject anything. Appellant has to consider what is claimed, which is that there is a rule editor that is configured to set a plurality of rules, or that rules are set in the method claim. In response to appellant's argument, if there is no way in Reuhl to configure or set the

rules so that the program can run, then how can you get the program to run if you cannot set the rules? The examiner is not using just any software program to reject the claims, that characterization is deceptive and misleading at best. Before the program of Reuhl can be run, the rules must be set by a programmer. How else can the rules be entered into the program? Appellant has claimed that the system has the ability to set a plurality of rules, which is fully present in Reuhl. Appellant also argued that "Reuhl is not enabled to have *dynamic rule configuration* as claimed". The examiner notes that this "dynamic rules configuration" is not language that is found in the claims. To the extent that the computer program of Reuhl can be changed, this ability is inherent to all programming. The examiner notes that appellant has not provided any argument that explains why the claimed limitation is not inherent to the prior art or why the prior art is not capable of being changed. Appellant has just alleged that it is not inherent and has not explained why it is not in the prior art.

Appellant has argued that Reuhl does not have the ability to designate a subset of products. Appellant has argued that this is an active process of indicating products. The examiner disagrees. Reuhl modifies prices for products and this is done by noting what products have new pricing data. The products are "designated" based on the fact that there is new pricing data for those products, which are a subset of all products because products without new data are not included in the subset. Reuhl is set up to determine prices for products that have new pricing data. This is a "designation" of products that satisfies the claim language.

With respect to claims 2 and 15, due to indefiniteness issues and taking into account that these claims are also seen as not being enabled, the examiner has applied the prior art as best as possible. In view of this the examiner stated that In the opinion of the examiner all that is claimed is the ability to designate a number N, or allowing a number to be designated (which is not even actually designating the number, just allowing it to occur). Appellant clearly disagrees but their response is essentially repeating what is claimed and stating that the position of the examiner is erroneous. In claims 2 and 15 it is claimed that the system allows or in the method “allowing” a number N to be designated. Allowing something to happen is not the same as reciting that the something is actually occurring. The examiner is not sure how to respond to appellant due to the fact that this claim appears to be indefinite and it is not clear as to what is being claimed. The prior art application was done in view of the claims as they are best understood.

For claims 3,16,25-28, appellant has argued that setting the lowest price for a product is not an optimization for one of total profit, sales volume, and total revenue. The examiner notes that only one of the 3 limitations of profit, volume, and revenue is required for the claim due to "of at least one". The examiner responds by taking the position that by having the lowest price for a product one is able to move more volume of the product due to that lower price. Appellant even stated that optimization for sales volume typically involves deep discounts which is more or less having a low price for the product, which results in more volume being moved. Having the lowest price for a product is a way to move more products because you are selling them at the lowest

price of all retailers that sell those products. This satisfies what is claimed. Also, if you have the lowest price for a product and sell a lot of it, you can make a lot of money. Making less per product on more sales volume of products (as opposed to making more on less volume) can yield a larger overall profit. The argument is not persuasive. The examiner also notes that the appellant has stated that "*Very infrequently will a single price fulfill all three objectives of optimizing profit, revenue, and sales volume*". That statement means that there are times when a single price is an optimization for profit, revenue and sales volume, this is the position that has been taken by the examiner. In some instances this situation will occur so it is entirely reasonable for the examiner to argue that by having the lowest price for a product one can optimize the price for total profit, sales volume, and total revenue.

For claim 19, the examiner notes that appellant has never previously traversed the position of the examiner with respect to this claim. Appellant never previously argued that the rejection was erroneous with respect to claim 19, which to the examiner was taken as a acquiescence as to the merits of the rejection; otherwise 37 CFR 1.111 required appellant to present an argument if they felt the claim was not properly rejected. Now for the first time on the record, in the Appeal Brief the appellant decides to argue this claim. Reuhl deals with new pricing data that represents new prices for various products. The pricing data includes new price data (as claimed) and other data that is seen as satisfying the claimed "new price bound data". The mere recitation to data that is just "provided" is taken as a recitation directed to non-functional descriptive material as this data is never used, it is merely provided. The limitation of "new price

bound data" is deemed to be satisfied by Reuhl and the identification of a product because the recited types of data are all directed to non-functional descriptive material.

With respect to claims 29,30, the issue at hand relates to the issue of whether or not a rule editor is in Reuhl that allows the rules to be set, because claims 29 recites the ability of the rule editor to configure various pricing rules and claim 30 recites various rule parameters. This has previously been addressed in the sense that a person can change the pricing rules if they want to. Claims 29 and 30 also recite "at least one of" so not all that is claimed is required in the claim for a rejection to be proper so the examiner does not have to address each and every claimed element of the groups claimed. With respect to referring to the disclosure on pages 11-20 (or page 17) where the unit pricing rule is addressed, the examiner does not see an explicit definition for this term. What is noted by the examiner is another equation with no discussion of the variables in the equation as far as what they are or how they are determined. This is not seen as a definition that requires something specific in the claims and if it is, then this would possibly render the claim both indefinite and non-enabled due to the unclear equation that is disclosed. This is a narrower interpretation that the examiner did not adopt as the term "unit pricing rule" was viewed as broader. The examiner believes that the claim limitation of "unit pricing rules" is broad and is not limited to the confusing equation listed on page 18 of the specification. The argument is not persuasive.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Dennis Ruhl/

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/John G. Weiss/

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/Janice A. Mooneyham/

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